Supreme Court, U.S.
FILED
MAY 2 2003
OFFICE OF THE CLERK

No. : 02-1447

In the

Supreme Court of the United States

NORTHWEST AIRLINES CORP. and
DELTA AIR LINES, INC.,

Petitioners,

-against-

NELSON CHASE, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. § 1254(1) to review directly a district court order granting class certification when the court of appeals has denied a Fed. R. Civ. P. 23(f) petition for interlocutory appeal and has not yet reviewed the district court's decision on the merits?

2. Whether this Court should review a non-final district court order granting class certification when the district court also certified a class on grounds other than those raised in the petition?

3. Whether the district court must resolve a conflict between the plaintiffs' and defendants' expert evidence and make a preliminary determination on the merits as a prerequisite to granting class certification under Fed. R. Civ. P. 23?

PARTIES TO THE PROCEEDING

The petitioners in this proceeding are Northwest Airlines Corp. and Delta Air Lines, Inc. ("Petitioners" or "Defendants").[1]

The following parties are respondents in this proceeding: Nelson Chase; BLT Contracting, Inc.; Keystone Business Machines, Inc.; Norman Volk; and all similarly situated persons ("Respondents" or "Plaintiffs"). No Respondent has a parent corporation and no publicly held company owns ten percent or more of any named respondent's stock.

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1. U.S.Airways Group, Inc., and U.S. Airways Inc. (collectively "US Airways') were defendants in the district court and are subject to the district court's order granting class certification. US Airways joined in the petition for interlocutory appeal pursuant to Fed. R. Civ. P. 23(f). During the pendency of the petition, US Airways filed for bankruptcy relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.* In denying the Rule 23(f) petition, the Sixth Circuit took judicial notice of the filing and that the appeal by US Airways (but not the other defendants) could not proceed in the absence of relief from the automatic stay. *In re Delta Air Lines*, 310 F.3d 953, 956-57 (6th Cir. 2002). On December 12, 2002, the United States Bankruptcy Court for the Eastern District of Virginia modified the automatic stay "to allow resolution of the petition by the debtors to appeal the district court's order certifying the plaintiff class currently pending before the United States Court of Appeals for the Sixth Circuit." Upon information and belief, US Airways took no action with respect to the appeal. US Airways was not a party to the petition for rehearing or rehearing en banc. US Airways is not a party to this petition for a writ of certiorari. On March 31, 2003, US Airways' plan of reorganization was confirmed and the automatic stay was lifted.

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PRELIMINARY STATEMENT

Respondents Nelson Chase, BLT Contracting, Inc., Keystone Business Machines, Inc. and Norman Volk ("Respondents" or "Plaintiffs") respectfully request this Court to deny the petition for a writ of certiorari seeking direct review of the district court's class certification order when the court of appeals denied Petitioners' Fed. R. Civ. P. 23(f) request for interlocutory appeal. The petition should be denied for the following reasons.

First, Petitioners have failed to demonstrate a basis for this Court's jurisdiction. As Petitioners concede, there is no precedent to support an appeal from a denial of a petition for interlocutory review under Fed. R. Civ. P. 23(f), and they fail to show a sufficient rationale for jurisdiction in this case. Moreover, Petitioners do not seek review of the Sixth Circuit's decision as 28 U.S.C. § 1254(1) contemplates, but rather an unprecedented direct review by this Court of the district court's class certification order that the Sixth Circuit has not reviewed on the merits.

Second, the district court's certification of a conspiracy class under Section 1 of the Sherman Act renders the basis for interlocutory review moot. Defendants' petition is premised on the argument that the district court failed to resolve a conflict between the experts regarding the proper market definitions with respect to Plaintiffs' Section 2 claims. As the district court set forth in great detail, the grounds for certification of the conspiracy class were completely independent of the evidentiary issues Petitioners' seek to raise in this petition. Accordingly, even if Petitioners' were granted the relief they request, the lawsuit would still proceed as a class action in the district court on Plaintiffs' Section 1 claim. Petitioners, therefore, have not articulated a rationale for interlocutory review.

Third, there is no conflict within the courts of appeal regarding an important matter at issue in this case. Contrary to Petitioners' suggestion, the courts of appeal do not disagree about the responsibility of a district court at the class certification stage to consider conflicting expert testimony or competing evidence. No circuit has held, as Petitioners claim, that a district court must "resolve" conflicting expert evidence regarding an ultimate issue in the lawsuit as a prerequisite to granting class certification. No circuit has held, as Petitioners suggest, that a district court can ignore conflicting evidence when considering the appropriateness of class certification. Moreover, the district court in this case rigorously analyzed the expert testimony offered by the parties and thoroughly considered Petitioners' possible defenses before deciding that class certification was appropriate.

Accordingly, Respondents respectfully request that the petition be denied.

COUNTER-STATEMENT OF THE CASE

1. Plaintiffs' Allegations

In this antitrust case, Plaintiffs have alleged that Defendants have conspired to eliminate discount ticketing practices know as "hidden-city ticketing" and engaged in other anticompetitive conduct in order to maintain the supra-competitive prices they charge for many flights to and from their respective hub airports.[2] As described more fully in their

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[2] Plaintiffs contend that Defendants' conduct constitutes an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, and unlawful maintenance of monopoly power in violation of Section 2 of the Sherman, 15 U.S.C. §2.

complaints and the decisions by the district court[3], Plaintiffs contend that Defendants have monopoly power on many routes to or from their respective hub airports (i.e. "spoke-hub" or "hub-spoke" routes), permitting the airlines to charge supra-competitive fares. In contrast, on so-called "spoke-hub-spoke routes," where frequently no single carrier is dominant, prices are determined by competition. The convergence of these competitive factors create fare anomalies known as "hidden-city ticketing," where prices on an airline's two-segment spoke-hub-spoke flights are often less expensive than prices on its shorter, one-segment spoke-hub flights. A passenger flying to (or from) a hub, therefore, could obtain the exact same service as a spoke-hub ticket by buying a cheaper spoke-hub-spoke ticket, deplaning at the hub (or so-called "hidden-city"), and discarding the remaining and unused flight coupon.[4]

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[3] *See Chase v. Northwest Airlines Corp.*, 49 F. Supp.2d 553 (E.D. Mich. 1999)(denial of motion to dismiss); *In re Northwest Airlines Antitrust Litig.*, 197 F. Supp.2d 908 (E.D. Mich. 2002)(denial of *Daubert* motion) and *In re Northwest Airlines Antitrust Litig.*, 208 F.R.D. 174 (E.D. Mich 2002)(denial of summary judgment motion and grant of class certification).

[4] The district court used as an example "a passenger who wishes to travel from New York to Northwest's hub airport in Detroit. Upon calling Northwest or a travel agent to inquire about fares, this passenger might discover that the unrestricted, one-way full fare for travel from New York to Detroit is $394.00. However, upon further inquiry, the passenger might learn that a one-way full fare ticket for travel from New York to Columbus, Ohio costs only $238.73. Yet, because of the hub-and-spoke layout of Northwest's flight network, it happens that a trip from New York to Columbus actually involves two segments, one from New York to Detroit and one from Detroit to Columbus. Thus, a savvy--or, Defendants would say, unscrupulous--traveler might elect to purchase a New York-Columbus ticket, disembark in Detroit, and simply throw away the unneeded portion of the ticket for travel from Detroit to Columbus." *In re Northwest Airlines Antitrust Litig.*, 208 F.R.D. at 180 (footnotes omitted).

Plaintiffs alleged, and evidence obtained during discovery confirmed, that for competitive reasons, the airlines did little during the 1980's to prevent hidden-city ticketing, and many actually encouraged the practice. By the early 1990's, however, hidden-city ticketing and similar practices had increased and certain airlines became concerned that such practices would undermine their ability to extract "hub premiums." While certain airlines may have wished to prevent hidden-city ticketing, it was against an airline's economic self-interest to try to do so unilaterally. Although airlines dominate many of the routes to and from their hubs, there are certain commercially important routes (such as flights between the hubs of two different carriers), where the airlines face direct competition. An airline that unilaterally tried to prevent hidden-city ticketing risked losing passengers on these hub-to-hub routes to competing carriers that effectively charged lower prices by tolerating or encouraging hidden-city ticketing. *In re Northwest Airlines Antitrust Litig.*, 208 F.R.D. at 180-182.

This potential for price competition between the airlines was enhanced by travel agents who account annually for approximately 80% of ticket sales. Because travel agents compete for ticket sales with the airlines and each other, a travel agent (given the chance) would sell discount hidden-city tickets to keep existing customers and attract new ones. Any carrier that unilaterally sought to penalize travel agents for selling hidden-city tickets, faced the risk that the travel agents would shift passengers to airlines that tolerated the practice. *Id.* at 182.

Recognizing that hidden-city ticketing could be prevented only through collective action, Defendants, by 1992 (if not earlier), conspired to eliminate hidden-city ticketing. As Plaintiffs allege, at the conspiracy's core was the Defendants' exchange of reciprocal assurances that each airline would

adhere to, and publicly support, an industry-wide condemnation of hidden-city ticketing. By reaching an industry-wide agreement, each airline was free to prevent hidden-city ticketing without fear of losing traffic to competitors. But for Defendants' anticompetitive conduct, travel agents would have become ticket discounters and hidden-city ticketing would have become ubiquitous. But for the anticompetitive conduct, the growth of hidden-city ticketing would have forced Defendants to reduce their supracompetitive hub-spoke fares system-wide. Plaintiffs alleged that Defendants' conduct not only constituted a conspiracy in restraint of trade in violation of Section 1, but was also unlawful under Section 2 because it insulated Defendants' monopolies on hub-spoke flights from competition and thus enabled them to continue to charge supracompetitive prices. *Id.* at 183-188.

2. Proceedings In The District Court

On April 23, 1999, the district court denied Defendants' Rule 12(b)(6) motions to dismiss, ruling that Plaintiffs' allegations stated claims under both Section 1 and 2. *Chase v. Northwest Airlines Corp.*, 49 F. Supp.2d 553 (E.D. Mich. 1999).

On November 15, 2000, after the close of discovery, Defendants moved to strike Plaintiffs' proposed expert testimony (the "*Daubert* Motion") and for summary judgment. On the same date, Plaintiffs moved for class certification. In support of their motion, Plaintiffs submitted thousands of pages of exhibits and other documents that demonstrated the basis for their antitrust claims and how these claims could be established with class-wide proof.

On March 1, 2001, the district court held a full-day hearing at which Plaintiffs' expert was extensively examined by

Defendants and the district court. On March 29, 2002, in a comprehensive opinion, the district court denied Defendants' *Daubert* Motion holding, *inter alia*, that Plaintiffs' expert testimony was based on sufficient facts and data and was sufficiently reliable and "helpful" to submit to the jury, including: (1) that city-pair markets were the appropriate relevant geographic markets in which to analyze Plaintiffs' Section 2 claims; (2) that Defendants had monopoly power on approximately 234 city-pair routes originating or terminating at a Defendant's hub airports due to their dominant market share on these routes and substantial entry barriers at the hubs that prevented effective competition from other carriers; and (3) that "but-for" Defendants' anticompetitive conduct, competition on the spoke-hub-spoke routes would have forced Defendants to lower fares on their hub-spoke routes to eliminate any hidden-city savings opportunities. *In re Northwest Airlines Antitrust Litigation*, 197 F. Supp.2d 908 (E.D. Mich. 2002). In so holding the district court carefully considered the expert evidence proffered by both sides as well as the individual claims and defenses Defendants raised noting that an expert opinion must "account for and not 'ignore [ ] inconvenient evidence,' and that it 'incorporate all aspects of the economic reality of the [relevant] market.'" *Id.* at 914, *quoting*, *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000).

On May 16, 2002, the district court, in a 116 page decision, denied Defendants' motions for summary judgment on Plaintiffs' Section 1 and 2 claims and granted, in part, Plaintiffs' motion for class certification.[5] *In re Northwest Airlines Corp., et al., Antitrust Litigation*, 208 F.R.D. 174 (E.D. Mich. 2002).

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[5] The district court denied Plaintiffs' motion for a Rule 23(b)(2) injunctive class on the grounds that suitable injunctive relief could be awarded under Rule 23(b)(3).

Regarding Plaintiffs' Section 1 claim the district court found, among other things, that Plaintiffs had produced sufficient evidence for a jury to find that:

> the Airlines [in the early 1990's] abandoned their past disparate policies and enforcement efforts regarding hidden-city ticketing, and collectively adopted a uniform stance designed to substantially deter the practice of hidden-city ticketing . . .

208 F.R.D. at 187. The district court also denied summary judgment on Plaintiffs' Section 2 claims finding that each Defendant's unilateral conduct insulated their respective monopolies on certain city-pair routes from competition. *Id.* at 207-215.

With respect to Plaintiffs' class certification motion, the district court described in great detail its analysis of the requirements of Rule 23, carefully considering the expert and competing evidence offered by both sides and certified a single Section 1 class and three Section 2 classes each corresponding to an airline Defendant.[6] *Id.* at 215-228. Discussing Defendants' criticisms of Plaintiffs' expert testimony regarding market definition, the court wrote:

> Next, regarding the product and geographic scope of Plaintiffs' market definition, the Court already has concluded in a prior Opinion that Defendants' challenges go only to the

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6. At a subsequent status conference, the district court stated that the Section 2 classes should be divided into subclasses, each corresponding to a particular Defendant's hub airport.

> evidentiary weight of Plaintiffs' expert opinions and the correctness of the conclusions drawn by those experts, but do not provide a basis for altogether excluding these opinions. Moreover, Defendants' quibbles do not render Plaintiffs' claims any less susceptible to class-wide or generalized proof. Whether, for example, the interchangeability of ground and air travel extends 150 or 300 miles, or whether certain markets (*e.g.*, Cleveland and Akron) are so close together that they create the possibility of substitution between city-pairs, the outcome of such inquiries still would result in a largely global set of rules through which one could, as a matter of common proof, ascertain the proper set of city-pair markets. As Plaintiffs note, any broader attack on the use of city-pairs surely cannot succeed, where the airlines themselves, as well as numerous government and academic reports, have adopted this same general approach to analyzing the air travel industry. In short, while Defendants' challenges might lead to a *shorter list* of city-pairs than the one offered by Plaintiffs' experts, they do not call into question Plaintiffs' overall city-pair approach to market analysis, nor do they require anything approaching 234 separate "trials" to determine the relevant markets.

Id. at 220.

Addressing Defendants' contention that potential individual defenses would overwhelm any common issues, the court wrote;

Finally, Defendants accuse Plaintiffs' experts of making an unwarranted leap from hub-based to market-wide findings of monopoly power, and they argue that it is necessary to separately examine each of Plaintiffs' 234 city-pairs for the presence of such power. Again, however, the Court has already held that Plaintiffs will be permitted to present their somewhat "hub-skewed" market analysis to the trier of fact. More generally, in their contention that individualized proof will be necessary to establish the requisite monopoly power in each city-pair market, Defendants overlook the core premise of Plaintiffs' Section 2 claims. Plaintiffs' entire Section 2 case rests upon the allegation that, by virtue of each Defendant's alleged monopoly power at its hub airports, Defendants are able to impose "hub premiums" on many passengers traveling to or from their hubs, thereby giving rise to hidden-city savings opportunities. Plaintiffs do not contend that this is an isolated city- specific phenomenon, but a generalized occurrence on many of the routes emanating from Defendants' hub airports. In other words, a hub monopoly, and its attendant effect on the bulk of city-pair fares involving a hub, is the lynchpin of Plaintiffs' Section 2 claims. If Plaintiffs are unable to persuade the trier of fact that each Defendant possesses such power at its hub airports, then Plaintiffs' claims must fail, irrespective of whether a given Airline might be found to possess monopoly power on this or that city-pair route

Id.

3. Proceedings In The Court of Appeals

Defendants sought permission to appeal the district court's class certification order to the court of appeals pursuant to Fed. R. Civ. P. 23(f). On November 21, 2002 the Sixth Circuit denied the petition in an opinion that set forth the circumstances in which a Rule 23(f) appeal should be allowed, cautioning that the Rule 23(f) appeal is never to be routine and that the "appeal should not become a vehicle for early review of a legal theory that underlies the merits of a class action." *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002). The court observed that "much of defendants' argument with respect to the class certification decision arises from their disagreement with the district court's earlier rulings on the motions to dismiss and for summary judgment." *Id.* at 961. With respect to Plaintiffs' claims the Court noted:

> As to the §1 claim, the court found a common issue in whether defendants had agreed upon a course of action. With respect to the §2 claims, the district court accepted the plaintiffs' view that a hub-based monopoly could support a claim, but the court noted that the determination of whether the monopoly was established ultimately rested with the fact-finder.

Id. at 956.

Following the Sixth Circuit's decision, Northwest and Delta petitioned for rehearing or rehearing *en banc*. On February 24, 2003, the petition was denied by Order stating:

> The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel

> members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.
>
> The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

See p. 144a to the Appendix to the Petition.

REASONS FOR DENYING THE WRIT

I. PETITIONERS HAVE FAILED TO SHOW A SUFFICIENT BASIS FOR THIS COURT'S JURISDICTION

Petitioners seek a writ of certiorari to have this Court review directly a district court's class certification order when the court of appeals has denied a petition for interlocutory review under Fed. R. Civ. P. 23(f). As Defendants concede, their petition is without precedent (Pet. at 5, 14) and the case law they rely on to construct a basis for jurisdiction is unconvincing.

As an initial matter, the Advisory Committee Notes for the 1998 Amendment to Rule 23 which added section 23(f), strongly suggest that there can be no appeal from the denial of a Rule 23(f) petition by the court of appeals. The Advisory Committee Notes state:

> Appeal from an order granting or denying class

> certification is permitted in the *sole discretion* of the court of appeals.
>
> * * *
>
> The court of appeals is given *unfettered discretion* whether to permit the appeal, *akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.*
>
> * * *
>
> Permission to appeal may be granted or denied *on the basis of any consideration* that the court of appeals finds persuasive.

Fed. R. Civ. P. 23, 1998 Amendment, Advisory Committee Note (emphasis added).[7]

Consequently, if the court of appeals has "unfettered discretion" to decide whether to grant permission to appeal, and can do so on any basis that it finds persuasive, there can be no review of the court of appeals' decision denying or granting the petition. Similarly, if the court appeals' discretion is comparable to the discretion of this Court in acting on a petition for certiorari, then the exercise of that discretion is unreviewable.

Petitioners contend nonetheless that this Court's decision in *Hohn v. United States*, 524 U.S. 236 (1998) suggests that jurisdiction exists under 28 U.S.C. § 1254(1) in

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[7] This Court often looks to the Advisory Committee Notes to determine the legislative history of a federal rule of evidence or procedure. *See, e.g., Huddleston v. United States*, 485 U.S. 681, 688 (1988).

this case. The critical distinction between *Hohn* and this case, however, is that in *Hohn,* the underlying order of the district court that the petitioner sought to appeal from – the denial of a motion to vacate a criminal conviction – was *unquestionably final* whereas here, the district court's order – the grant of class certification – is *unquestionably interlocutory*.[8] In holding that the court of appeals' denial of a request for a certificate of appealablity constituted a case in the court of appeals for purposes of § 1254(1) jurisdiction, this Court noted that "when the district court has denied relief *and applicable requirements of finality have been satisfied*, the nex. step is review in the court of appeals." 524 U.S. at 241 (emphasis added). Here the applicable requirements of finality have not been satisfied as Petitioners seek to appeal the denial of a non-final order of class certification.[9] Not only is a class certification decision subject to modification or revision until the conclusion of the case, but in this case the district court left unresolved significant issues to be determined upon further proceedings, such as whether subclasses are required or advisable, clearly showing that the district court did not intend the certification order to be the last word on the subject. *In re Northwest Airlines Antitrust Litig.*,

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8. As this Court has often explained, "[w]e generally await final judgment . . . Before exercising our certiorari jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993).

9. As this Court has previously held, orders relating to class certification are not independently appealable under 28 U.S.C. § 1291 or under the "collateral order" exception articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Accordingly, Petitioners' reliance on *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) for the proposition that this Court has jurisdiction to review district court orders that have not been reviewed by an intermediate appellate court is misplaced since the very basis for jurisdiction in *Nixon* was the "collateral order doctrine." 457 U.S. at 741-743.

208 F.R.D. at 200 n.41, 227 n. 47.

Further undermining Petitioner's claim for jurisdiction is the nature of the review they request this Court to perform. In *Hohn*, the petitioner sought and obtained a remand to the court of appeals for reconsideration of its denial of a certificate of appealability. Here, in stark contrast, Petitioners do not seek a remand to the Sixth Circuit for reconsideration of its denial of the Rule 23(f) petition, but instead want this Court to review directly the district court's certification order. Even if the denial of a Rule 23(f) petition is considered a case in the court of appeals for purposes of 28 U.S.C. § 1254(1), that statute does suggest that this Court has jurisdiction to review directly an interlocutory order of the district court. Moreover, Defendants jurisdictional argument is extremely tortured. First, they argue that the Sixth Circuit's denial of the Rule 23(f) petition was a case in the court of appeals for purposes of 28 U.S.C. § 1254(1). Next they contend that certiorari jurisdiction is appropriate because a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals. The obvious flaw in this line of reasoning, however, is that the Sixth Circuit did not render a decision on the merits in this case and the claimed conflict is among circuits other than the Sixth Circuit. Despite Petitioners' efforts to manipulate the statute and bootstrap a claim, there remains a serious question whether Petitioners have presented a "case" or "controversy" within the meaning of Article III of the Constitution.

Petitioners' attempt to invoke the All Writs Act, 28 U.S.C. § 1651, is also misplaced. This Court has consistently held that the All Writs Act is not to be used as a substitute for appeal, *see, e.g., Ex parte Fahey*, 332 U.S. 258, 259-60 (1947), and that its traditional use has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction. *Roche v.*

Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943); *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 402 (1976) ("only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."). Not even Petitioners have been so reckless as to contend that the district court's grant of class certification or the Sixth Circuit's denial of the Rule 23(f) petition constituted a usurpation of power by an inferior court. Petitioners have made no showing that jurisdiction under the All Writs Act exists here.[10]

Accordingly, Petitioners have failed to demonstrate a jurisdictional basis for the Court to grant a writ of certiorari.

II. THE DISTRICT COURT'S CERTIFICATION OF A SHERMAN ACT SECTION ONE CLASS RENDERS MOOT THE BASIS FOR THIS PETITION

Defendants' petition for interlocutory review of the district court's class certification order is based on the faulty premise that the district court's analysis of the expert testimony regarding Plaintiffs' market definitions was dispositive of the district court's entire class certification order. Defendants ignore, however, the significance of the district court's certification of a single Section 1 conspiracy class. As the district court noted:

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[10] Consequently, the cases cited by Petitioners where jurisdiction was based on the 28 U.S.C. § 1651 are inapplicable. *See, e.g., Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 300 (1989).

> Initially, as Plaintiffs point out, Defendants' challenges to Plaintiffs' market analysis do not affect the question of class certification with respect to Plaintiffs' Section 1 claims. As explained earlier, the agreement alleged by Plaintiffs, if proven, likely would be subject to only an abbreviated or "quick look" form of Rule of Reason analysis, and Plaintiffs would not be called upon to produce a detailed market-by-market analysis of the anticompetitive effects of Defendants' alleged agreement. *See California Dental Ass'n v. Federal Trade Comm'n,* 526 U.S. 756, 769-70, 119 S.Ct. 1604, 1612-13 (1999). In any event, any weakness in Plaintiffs' analysis of a particular city-pair market seemingly would have no bearing on their § 1 claim, where there is no evidence that any Airline has ever even considered a partial prohibition on hidden-city ticketing, depending on the conditions in a particular market. Even under a full-blown Rule of Reason analysis, then, there is no reason to think that the outcome will turn upon market-to-market distinctions; rather, in this regard, Plaintiffs and Defendants alike seemingly are proceeding under the assumption that the economics of the industry are largely driven by the nature and characteristics of a hub-spoke network. In short, any alleged defects in Plaintiffs' market analysis are of no consequence to their request for class certification of their antitrust conspiracy claim.

In re Northwest Airlines Antitrust Litig., 208 F.R.D. at 220.

Consequently even were the Court to grant the

unprecedented and extraordinary relief Petitioners seek and decertify the Section 2 classes, this action would proceed as a class with respect to Plaintiffs' Section 1 claims. Accordingly, any rational for the need for interlocutory review is rendered moot.[11]

III. THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL CONCERNING THE RESPONSIBILITY OF THE DISTRICT COURT AT THE CLASS CERTIFICATION STAGE TO EVALUATE EXPERT TESTIMONY AND COMPETING EVIDENCE

In their effort to present an issue appropriate for review on a writ of certiorari, Defendants mischaracterize the holdings of the courts of appeal contending there is a conflict among the circuits regarding a district court's responsibility on a motion for class certification to "evaluate" conflicting expert testimony. They contend that a district court is required to "resolve a conflict between the parties' experts" as a prerequisite to granting class certification. Pet. at 19.[12] They say that the Third and Seventh Circuits support this view while the Second Circuit

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11. "The finality requirement in § 1291 evinces a legislative judgment that 'restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 471 (1978), *quoting*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

12. Curiously, Petitioners took the opposite position before the Sixth Circuit in their Rule 23(f) petition stating that "[t]he district court was not obliged to resolve a 'battle of the experts.'" *Petition of Delta Air Lines, Northwest Airlines Corp., Northwest Airlines, Inc., US Airways Group, Inc. and US Airways, Inc. For Review of Order Granting Class Certification*, (May 31, 2002) at 35.

holds that a district court need not evaluate conflicting expert or other evidence. Petitioners do not claim that the Sixth Circuit has entered a decision in conflict with the decision of another United States court of appeal regarding this issue as this Court's rules indicate is a proper consideration governing review on certiorari. Sup. Ct. R. 10(a). Indeed, if Petitioners have their way, the Sixth Circuit would never even consider the issue since Defendants seek to have this Court review directly the district court's certification order. In any event, the cases Defendants' rely on are entirely consistent with each other. As shown below, a district court, whether sitting in the Second, Third or Seventh Circuit, may not unquestionably accept the submission of an expert as conclusive evidence of the appropriateness of class certification. In either the Second, Third or Seventh Circuit, a district court has the responsibility to carefully examine a party's evidence proffered in support of class certification as well as consider the criticisms and defenses advanced by the opposing parties' expert. And in either the Second, Third or Seventh Circuit, the ultimate question for the district court is not whether the plaintiff will prevail on the merits but whether the requirements of Rule 23 have been met.

Defendants argue that the district court in this case should have "resolved" the dispute between the parties' experts regarding the appropriate market definitions before certifying a class. They claim that the district court instead applied the rule adopted by the Second Circuit in *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 2382 (2002) which, they contend, does not permit a district court to evaluate conflicting expert opinion.[13] They contend that decisions in the Third and

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[13] In *In re Visa Check/MasterMoney Antitrust Litig.*, this Court denied the petition for certiorari that alleged the identical conflict among the circuits

Seventh Circuits establish a contrary rule that a district court must resolve a "battle of the experts" before a class can be certified. *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir.), *cert. denied*, 534 U.S. 951 (2001); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178 (3d Cir. 2001); *In re Bridgestone/Firestone*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 870 (2003); *West v. Prudential Secs., Inc.*, 282 F.3d 935 (7th Cir. 2002). Pet. at 19-21. None of the cases cited by Petitioners, however, stand for the proposition they assert.

Petitioners contend that the Second Circuit does not permit a district court to evaluate the conflicting opinions of the parties' experts on a motion for class certification. In *In re Visa Check/MasterMoney Antitrust Litig.*, however, the Second Circuit, in affirming the certification order, described at great length the manner in which the district court had rigorously evaluated the expert evidence proffered by both plaintiffs and defendants. For example, the Second Circuit noted that:

> The district court, in an almost fifty page opinion, throughly considered each of defendants' criticisms of Carlton's theory and Carlton's response to each of those criticisms and concluded in each case that Carlton's response sufficiently addressed the criticisms. The district court correctly noted that its function at the class certificating stage was not to determine whether plaintiffs had stated a cause of action or whether they would prevail on the merits, but rather whether they had shown, based on methodology that was not

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as alleged here.

> fatally flawed, that the requirements of Rule 23 were met. . . . As for defendants' claim that plaintiffs' expert evidence failed to provide a reliable basis for class certification, the district court's finding that Carlton's methodology was not fatally flawed, and therefore, was sufficiently reliable for class certification purposes, does not constitute an abuse of its discretion.

In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d at 135 (internal citation omitted). The Second Circuit, however, did reject the defendants' suggestion (also made here) that in addition to rigorously examining the evidence, a district court must resolve the ultimate facts contested in the expert evidence, following instead this Court's instructions in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) that "[i]n determining the propriety of a class action the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Id.* at 133.

The Seventh and Third Circuit cases cited by Petitioners are not in conflict, and in fact *Szabo*, *Johnston* and *In re Bridgestone* do not even address the issue of expert testimony, conflicting or otherwise, in the class certification decision. In *Szabo*, the Seventh Circuit vacated and remanded for further review an order certifying a nationwide class brought under state law in a breach of warranty and fraud action finding that problems of choice of law and individual issues of fact regarding misrepresentations made threatened to defeat any claim of commonality and presented nagging issues of manageability. The Seventh Circuit instructed that a district court's analysis must do more than merely *assume* that all class members are similarly situated or *assume* that whatever the plaintiff alleged must be true. 249 F.3d at 674. Nowhere in the opinion,

however, does the court suggest that a district court must resolve any disputes between the experts, indeed there is no reference to expert evidence anywhere in the opinion. Nor did the Seventh Circuit's decision in *In re Bridgestone*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 870 (2003) involve the question whether the district court must resolve conflicting expert testimony in the class certification decision. The issue in *In re Bridgestone* was whether the court could certify a single nationwide class where the claims must be ultimately adjudicated under the law of multiple jurisdictions.

Similarly in *Johnston*, the Third Circuit did not address a district court's responsibility to evaluate expert testimony at the class certification stage. Rather, as in *Szabo* the Third Circuit merely cited the unremarkable proposition that a district court should "examine the factual record underlying plaintiffs' allegations in making its certification decisions." 265 F.3d at 189. Inexplicably, Petitioners in their survey of Third Circuit law omit any reference to *In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002), *cert. denied sub nom. Gaylord Container v. Garrett Paper, Inc.*, __ U.S. __, 2003 WL 162676, 71 USLW 3490 (April 21, 2003), in which the Third Circuit affirmed a class certification order where the district court refused to resolve a dispute among experts at the class certification stage. *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 217 n.13 (E.D.Pa. 2001) ("To the extent that this discussion involves a battle of experts, it [is] not appropriate for the Court to determine which expert is credible at this time.").

Petitioners have failed to show a conflict in the circuits. Rather, in each circuit, a district court cannot merely assume that all class members are similarly situated but must conduct a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied before certifying. This is precisely what the district court did here.

While, the Seventh Circuit's decision in *West v. Prudential Secs., Inc.*, 282 F.3d 935 (7th Cir. 2002) did involve the question of expert testimony, the court reversed the certification order there precisely because the district court failed to conduct the rigorous analysis of the expert testimony that the district courts undertook in *In re Visa Check/MasterMoney Antitrust Litig.* and in this case. In *West,* there was no factual record evaluating the proffered expert testimony. In addition to an empty factual record, the expert testimony in *West* proposed a novel and untested theory of liability and causation that marked "a substantial extension of the fraud-on-the-market approach." 282 F.3d at 937. In granting class certification, the district judge merely "observed that each side has the support of a reputable financial economist . . . and thought the clash enough by itself to support class certification and a trial on the merits." 282 F.3d at 938. In the Second Circuit and here, however, the expert testimony did not propose an untested and new theory of liability and causation but simply applied well settled methodologies regarding market definition and antitrust injury in antitrust cases. Moreover, in each case the district court thoroughly examined the expert testimony and did not rely on a mere "clash" of the experts as a sufficient basis to justify class certification.

Finally, Petitioners' contention that there is a conflict among the circuits regarding a district court's obligation to consider competing evidence (expert or otherwise) at the class certification stage is pure contrivance and completely unsupported. Rather than back their argument with decisions from the courts of appeal that are supposedly in conflict, Petitioners merely complain that the district court below rested its certification "solely upon plaintiffs' proof" (Pet. at 22) and that the Second Circuit has so lowered the threshold for class certification that it is virtually automatic in any case in which plaintiffs have hired a reputable expert. (Pet. at 23). These

statements have no relationship to the truth, however, since in both cases, the district courts engaged in a thorough analysis of the parties' competing evidence before determining that class certification was appropriate.

Here in particular, there can be no question that the district court carefully considered Defendants' proposed proof. As quoted earlier in this brief (pp. 7-9), the district court's opinion was an exhaustive analysis of Defendants' as well as Plaintiffs' evidence that led the court to reject Defendants' argument that common issues would not predominate over individual defenses.

Moreover, Defendants' contention that Plaintiffs' market analysis is "unprecedented" and requires a "mass trial" (Pet. at 12) is patently false, since as the district court noted, the "airlines themselves, as well as numerous government and academic reports have adopted this same general approach to analyzing the air travel industry." *In re Northwest Airlines Antitrust Litig.*, 208 F.R.D. at 220. In fact, as was demonstrated to the district court, Northwest advanced the identical market analysis in a Section 2 action in which it alleged that American Airlines was in danger of monopolizing *1541 separate city-pair markets. Continental Airlines, Inc., and Northwest Airlines, Inc. v. American Airlines, Inc.*, (C.A. No. 92-1259-1260, S.D. Tex.).[14]

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[14] Northwest's expert testified that:

> . . It is not necessary to give a detailed study to each of those 1,541 city pairs to decide whether American had a dangerous probability of monopolizing those city pairs, each particular one. You can do that by examining what was happening in and around American hubs and in the country generally. By monopolizing here I mean charging monopoly prices. You do, of course, have

IV. THERE IS NO CONFUSION REGARDING THIS COURT'S DECISION IN *EISEN* THAT REQUIRES CLARIFICATION BY THE COURT

Finally, Petitioners invite this Court to clarify what they claim is a "common misreading" of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) – that the decision precludes a consideration of the merits at the certification stage. Pet. at 24. In making this argument, Petitioners wrongly equate a *consideration* of the merits with a *determination* of the merits. Petitioners can cite to no court that ignores this Court's instructions that "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982), or that an evaluation of the questions entering into determination of class action questions may be intimately involved with the merits of the claims. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978). Nothing in *Eisen, Falcon,* nor *Coopers & Lybrand*, however, requires a district court to make a preliminary determination of the merits at the class certification stage as Petitioners demand here. Indeed, one of the principal cases upon which Petitioners rely warns against such a premature undertaking:

> The success of the 1966 amendments (which are still in force) depends on making a definitive certification before deciding the case on the merits, and on judicial willingness to certify

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to know where the city pair is, but you don't need a detailed study of each one.

The deposition excerpts were submitted in support of Plaintiffs' class certification motion. *See* TAB 124 (Appendix to Class Certification Motion).

> classes that have weak claims as well as strong ones. A court may not say something like "let's resolve the merits first and worry about the class later" (Rule 23(c)(1) requires the certification decision to be made "[a]s soon as practicable after the commencement of an action brought as a class action") or "I'm not going to certify a class unless I think that the plaintiffs will prevail."

Szabo, 249 F.3d at 744.[15]

Here, the district court's certification analysis (which was part of its decision denying summary judgment and incorporated the analysis from its prior *Daubert* decision) probed well beyond the pleadings and satisfied the rigorous analysis that is required by a district court at the class certification stage. It was required to do no more.

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15. As *Eisen* continues to instruct, "[i]n determining the propriety of a class action, the question is not whether the plaintiff . . . will prevail on the merits, but rather whether the requirements of Rule 23 are met." 417 U.S. at 178.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

May 1, 2003

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